

Attorney General's Office  
100 N. Carson Street  
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO  
Attorney General  
MARTA A. ADAMS  
Senior Deputy Attorney General  
Nevada State Bar #1564  
100 North Carson Street  
Carson City, Nevada 89701-4717  
Telephone: (775) 684-1237  
Facsimile: (775) 684-1103  
*Attorneys for State of Nevada*  
*Department of Wildlife*

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

v.

WALKER RIVER IRRIGATION DISTRICT,  
A corporation, et al.,

Defendants.

IN EQUITY NO. C-125-B-ECR

NEVADA DEPARTMENT OF  
WILDLIFE'S PRELIMINARY  
LEGAL THEORIES

Pursuant to the Court's August 20, 2007 Order, the Nevada Department of Wildlife (NDOW) submits the following preliminary legal theories. These preliminary legal theories are not intended to represent an all-inclusive list of NDOW's legal positions. As this litigation proceeds and discovery is conducted, NDOW's legal theories may change and will be modified.

**1. (Res Judicata)**

The water rights incident to the Walker River Decree were fully adjudicated by this Court. *United States v. Walker River Irrigation District*, 11 F.Supp. 158 (D.Nev. 1935); rev'd. *United States v. Walker River Irrigation District*, 104 F.2d 334 (9<sup>th</sup> Cir. 1939). Under the

1 doctrine of *res judicata*, the water rights established in the Walker Right decree are final.  
2 *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906 (1983).

3 **2. (Res Judicata)**

4 Construction of Weber Dam was complete or nearly complete by the time the Walker  
5 River Decree was entered. If an additional water right for the benefit of the Walker River  
6 Paiute Tribe (Tribe) was contemplated, it would have been included in the original  
7 adjudication. *Id.*

8 **3. (Public Trust)**

9 Operation of Weber Dam and Reservoir by the U.S. Bureau of Indian Affairs has  
10 deprived NDOW of water that in certain years should have inured to the benefit of Walker  
11 Lake and NDOW's state-issued water right for the fishery in Walker Lake. E.g., *Mineral*  
12 *County v. Nevada*, 117 Nev. 235, 20 P.3d 800 (Nev. 2001); *State v. Bunkowski*, 88 Nev. 623,  
13 503 P.2d 1231 (Nev. 1972).

14 **4. (Waste)**

15 Water use along the Walker River, particularly by phreatophytes on the lower reaches  
16 of the river, results in the waste of water to the detriment of Walker Lake. NRS 533.460.

17 **5. (Winters Doctrine)**

18 The purpose of the Walker River Reservation, with the exception of irrigation on 2100  
19 acres accommodated in the Walker River Decree, is for *dryland grazing*. No additional water  
20 rights for irrigation are needed to accomplish this purpose. *Winters v. United States*, 207 U.S.  
21 564 (1908).

22 **6. (Extinguishment of claims by ICC payment)**

23 The Indian Claims Commission determined that the Walker River Indians' land was  
24 taken from them on December 31, 1862. *Northern Paiute Nation and the Bands Thereof, et*  
25 *al. v. U.S.*, 7 Ind. Cl. Com. 615 (June 4, 1959) The value of the land taken from the Paviotso,  
26 or Northern Paiutes, including the Walker River Indians, was determined. *Northern Paiute*  
27 *Nation and the Bands Thereof, et al. v. U.S.*, 16 Ind. Cl. Com. 215 (November 4, 1965). The  
28

1 valuation of \$15,790,000 was upheld on appeal. *Northern Paiute Nation v. U.S.*, 183 Ct. Cl.  
2 321, 393 F.2d 786 (April 10, 1968).

3 In addition to a land claim, the Walker River Paiute Tribe made several other claims for  
4 compensation under the Indian Claims Commission Act, 605 Stat. 1060, 25 U.S.C. § 70(a), et  
5 seq.. *Northern Paiute Nation v. U.S.*, 8 Cl. Ct. 470 (July 11, 1985). Among these was a claim  
6 that the United States failed to provide a sufficient water supply to irrigate the Tribe's land,  
7 described as Count IV in Docket No. 87-A, which claim was proved. *Id.* at 488.

8 On March 23, 1989, a Stipulation for Compromise Settlement and Entry of Final  
9 Judgment was filed in *Northern Paiute Nation v. U.S.*, Docket no. 87-A. On March 24, 1989,  
10 judgment for \$4,300,000 was given to the Walker River Tribe for all claims of loss suffered as  
11 the consequences of the United States' alleged failure to provide an irrigation system  
12 sufficient to supply water to the irrigable lands of the Walker River Indian Reservation.

13 On November 23, 1992, judgment for \$2,500,000 was awarded to the Walker River  
14 Tribe, in Docket No. 87-A for grazing and fiscal claims. The case was dismissed on January  
15 13, 1993.

16 A fisheries claim originally presented in Docket No. 87 was segregated from the main  
17 docket and designated Docket No. 87-E. A judgment was paid. *Northern Paiute Nation v.*  
18 *U.S.*, 8 Cl. Ct. 470 at 477, n.6. The amount of the award and the specific findings of the court  
19 are not known. Discovery is needed to support this preliminary legal theory.

20 **7. (Diminishment of reservation; reestablishment for *dry land grazing*)**

21 The 1906 cession altered the boundaries of the reservation so that the ceded lands  
22 were no longer within the limits of the reservation and were restored to the public domain.  
23 *U.S. v. Southern Pac. Transp. Co.*, 543 F.2d 676, 694, 696 (9<sup>th</sup> Cir. 1976).

24 ///

25 ///

26 ///

27 ///

28 ////

1           **8.     (State regulation of groundwater)**

2           Regulation of groundwater in Nevada is within the State Engineer's statutory  
3 jurisdiction (NRS Chapter 534) and is not part of the Walker River Decree.

4           Dated: December 17, 2007.

Respectfully submitted,

5           CATHERINE CORTEZ MASTO  
6           Attorney General  
7           MARTA A. ADAMS  
8           Senior Deputy Attorney General  
9           Nevada Bar No. 1564  
10          100 North Carson Street  
11          Carson City, Nevada 89701-4717  
12          (775) 684-1237  
13          madams@ag.state.nv.us

By: /s/ Marta Adams

Marta Adams

*Attorneys for Nevada Division of Wildlife*

Attorney General's Office  
100 N. Carson Street  
Carson City, Nevada 89701-4717

**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General and that on this 17th day of December 2007, I served a copy of the foregoing **Nevada Department of Wildlife's Preliminary Legal Theories**, by placing said document in the U.S. Mail, postage prepaid, addressed to:

Greg Addington, Esq.  
Asst. U.S. Attorney  
100 W. Liberty St., Ste. 600  
Reno, NV 89509

George N. Benesch, Esq.  
190 W. Huffaker Lane, Ste. 408  
Reno, NV 89511

Gordon H. DePaoli, Esq.  
Dale E. Ferguson, Esq.  
Woodburn and Wedge  
6100 Neil Road, Ste. 500  
Reno, NV 89511

Simeon M. Herskovits  
Advocates for Community & Environment  
129 - C Kit Carson Rd.  
Taos, NM 87571

John W. Howard  
625 Broadway, Ste. 1205  
San Diego, CA 92101

Erin K.L. Mahaney  
Office of Chief Counsel  
State Water Resources Control Board  
1001 I Street, 22nd Floor  
Sacramento, CA 95814

Cheri Emm-Smith  
Mineral Co. Dist. Atty.  
P.O. Box 1210  
Hawthorne, NV 89415

William E. Schaeffer  
P.O. Box 936  
Battle Mountain, NV 89820

David L. Negri  
U.S. Dept. of Justice  
Env. & Natural Resources Division  
161 E. Mallard Dr., Ste. A  
Boise, ID 83706

Michael Neville, Dep. Atty. Gen.  
DOJ, Off. Of the Atty. General  
455 Golden Gate Avenue, Ste. 11000  
San Francisco, CA 94102-3664

Karen A. Peterson  
Allison, MacKenzie, Pavlakis,  
Wright & Fagan, Ltd.  
402 N. Division St., P.O. Box 646  
Carson City, NV 89702

Laura A. Schroeder  
Schroeder Law Offices, P.C.  
1915 N.E. 39th Ave.  
P.O. Box 12527  
Portland, OR 97212-0527

Stacey Simon, Dep. Co. Counsel  
Mono County  
P.O. Box 2415  
Mammoth Lakes, CA 93546-2415

Wes Williams, Jr.  
P.O. Box 100  
Schurz, NV 89427

Susan L. Schneider, Trial Atty.  
U.S. Dept. of Justice  
Env. & Nat. Resource Division  
1961 Stout St., 8th Floor  
Denver, CO 80294

/s/  
Vicki Beavers, Legal Secretary II

Attorney General's Office  
100 N. Carson Street  
Carson City, Nevada 89701-4717